CADWALADER

CABINET NEWS

Research and commentary on regulatory and other financial services topics

Summer's Over and the Regulations Keep Coming

September 4, 2025

Table of Contents:

End of Summer Regulatory Round-Up

September 4, 2025

By Mercedes Kelley Tunstall
Partner | Financial Regulation

As summer comes to an end, here is a round-up of regulatory activities in financial services:

- Consumer Financial Protection Bureau Sues Synapse. The fintech filed for bankruptcy in April 2024 **has been sued by the CFPB on August 21** for unfair, deceptive or abusive acts or practices in violation of the Consumer Financial Protection Act. As readers may recall, Synapse was a middle-ware fintech that offered services involving maintaining ledgers for accounts consumers opened through other fintechs. The funds for the accounts were held in "for the benefit of" accounts at depository institutions, which means that transactions consumers effected through the accounts held by fintechs were not recorded by the banks, but rather were supposed to be maintained in ledgers by Synapse. When Synapse filed for bankruptcy, they ceased providing access to their ledgers and consumers were left without any access to their funds. Further, the amounts consumers thought they had in their accounts were mostly greater than the amounts held at the depository institutions. This has meant that affected consumers, as the complaint states, "they were unable to afford food or pay their rent, mortgage, hospital bills, or other bills without access to their funds." These consumers have not yet been made whole. Filed along with the court case was a **proposed stipulated final judgment** that included a whole raft of injunctive relief, but then assessed only $1 of civil penalties against Synapse. The point of this case and settlement? Two-fold – first, the CFPB wanted to ensure that whatever entity comes out of bankruptcy is permanently enjoined from engaging in the same or similar business, and second, the CFPB wanted to make sure that the consumer information is not sold or otherwise leveraged as an asset for the bankruptcy estate.
- Open Banking Rule May Not Be Dead at the CFPB. With comments due by October 21, 2025, the CFPB published an **advanced notice of proposed rulemaking** (ANPR) that seeks to start again on the concept of "open banking" per Section 1033 of the Consumer Financial Protection Act (CFPA). The so-called Open Banking Rule the CFPB put into place during the Biden administration, in October 2024, which is available **here**, was viewed as flawed by the Trump administration. Meanwhile, private litigants had sued the agency to prevent the rule from going into effect, and on "July 29, 2025, the court granted a motion to stay proceedings in the case, following the Bureau's announcement that it 'seeks to comprehensively reexamine this matter alongside stakeholders and the broader public to come up with a well-reasoned approach . . . that aligns with the policy preferences of new leadership and addresses the defects in the [Open Banking Rule].'" And now, the skeleton crew at the CFPB has put out a four-page ANPR that seeks to consider whether a more limited rule, addressing five distinct issues would be appropriate. Those five issues are: 1) to establish the proper understanding of who can serve as a ''representative'' making a request to a financial institution on behalf of the consumer; 2) the optimal approach to the assessment of fees to defray the costs incurred by a ''covered person'' in responding to a customer driven request; 3) the potential negative consequences to the consumer of exercising the right to request sharing of their financial data in an environment where there are tens of thousands of malign actors regularly seeking to compromise data sources and transmissions; 4) the potential negative consequences to the consumer in exercising this right where the data contains information that the consumer may not want disclosed, but does not fully understand or realize may be disclosed by the third party through which it has made a request; and (5) the potential benefits to consumers or competition of facilitating the consumer-authorized transfer of data to financial technology companies, application developers, and other third parties.
- CFPB Proposes Rule to Make Supervision of Nonbanks Much Narrower. With comments due just a month later, on August 25, **the CFPB issued a proposed rule** that seeks to ensure that nonbanks supervised by the CFPB are supervised only when there is high likelihood of significant potential harm to consumers caused by the products or services being offered. Characterizing the previous supervision approach as including even "immaterial potential harms", the proposed rule is vaunted as being able to "ensure that the Bureau acts within the bounds of its statutory authority and provide clarity to institutions about the standard the Bureau applies."
- FDIC Will Examine Discrimination Claims Only Upon Direct Evidence of Disparate Treatment. The Federal Deposit Insurance Corporation (FDIC), which has authority to examine financial institutions for compliance with the anti-discrimination provisions of the Equal Credit Opportunity Act and the Fair Housing Act, has amended its examination manual to require that only when there is evidence of disparate treatment among protected classes, will the FDIC look at whether discrimination has occurred. This means that disparate impact analyses will no longer be used by

the FDIC, and instead it will rely only upon “overt evidence of disparate treatment or comparative evidence of disparate treatment.” While most of the 57 pages of the manual that were redlined show changes only when the manual discusses disparate impact, there was one provision that was not necessarily related to disparate treatment that was deleted. The now-deleted provision was in a section that advises examiners how to evaluate statements from the institutions being examined and counseled, “Do not speculate or assume that the institution’s decision-maker had specific intentions or considerations in mind when he or she took the actions being evaluated. Do not, for example, conclude that because you have noticed a legitimate, nondiscriminatory reason for a denial (such as an applicant’s credit weakness), that no discrimination occurred unless it is clear that, at the time of the denial, the institution actually based the denial on that reason.”

Defining (Again) The Scope of "Commodity"

September 4, 2025

By Peter Y. Malyshev
Partner | Financial Regulation

On July 21, 2025, a U.S. district court judge in Texas stated in an opinion and order[1] that "section 1 [of the Commodity Exchange Act ("***CEA***")[2]] does not encompass precious metals [such as gold] as commodities because they are neither agricultural products nor movie tickets."[3] The judge cited a lot of authority in his opinion, but another quote comes to mind from Voltaire: "opinion has caused more trouble on this little earth than plagues and earthquakes." Indeed, the law is very well established on the matter that gold is a "commodity" under § 1a(9) of the CEA.

Questioning the scope of the definition of "commodity" will cause a lot of confusion and create unnecessary uncertainty in an otherwise established area of law because this analysis may apply to other new "articles" and "goods" "in which contracts for future delivery are presently . . . dealt in," such as various digital commodities (*e.g.*, cryptos or tokens), or event contracts (*e.g.*, outcomes of sports games), or other things that may be developed in the future. Recognizing the importance of this litigation, the Commodity Futures Trading Commission (the "***CFTC***") filed a brief on August 28, 2025[4] addressing in great detail which "goods" and "articles" are included in the definition of "commodity" and why this is important, particularly now.

- **The Facts of the Case**.

The facts of the case are very straightforward. In 2020, the CFTC, along with state attorneys general and regulators from thirty states, brought a fraud action against defendants in connection with a scheme to entice mostly retired individuals to use their retirement funds to invest in gold and silver bullion and coins.[5] The defendants made numerous false statements and sold otherwise liquid precious metals, coins, and bullion at exorbitant markups (*e.g.*, a 128% markup for silver and 91% for gold), claiming that these were unique numismatic assets.[6] They were not. The CFTC sued under § 6(c)(1) of the CEA and § 180.1 of the CFTC regulations.[7] None of the contracts offered under the defendants' scheme were derivatives (*i.e.*, "commodity interests"), which was not in dispute between the parties.[8]

- **CFTC's Jurisdiction**.

Under the CEA, the CFTC has exclusive jurisdiction over transactions in "commodity interests,"[9] meaning that only the CFTC can promulgate regulations as well as prosecute fraud and manipulation in derivatives – and that federal preemption applies, to the exclusion of states' and other federal regulators' jurisdictional reach.

However, with respect to transactions involving only "commodities" without derivatives, the CFTC has only enforcement jurisdiction.[10] Further, if there is no "commodity" involved, the CFTC has no jurisdictional reach at all. Whether gold and silver bullion is a "commodity" is the core issue in this case because, as the August 28 CFTC's Brief states, "[w]ithout correction of the [July 21 Opinion and Order] to clarify that precious metals are commodities, it will be impossible for the parties to prepare for and conduct the rapidly approaching trial in this case."[11]

- **Defining Commodity**.

The August 28 CFTC's Brief provides a very detailed analysis of the scope of the definition of "commodity" under the CEA.

First, the CFTC discusses how the definition in § 1a(9) came about and how it was expanded since 1922, and explains that because the definition provides a list of enumerated agricultural commodities, catch-all provisions were included to address additional commodities in which there may develop a futures market in the future.[12] Second, the CFTC points out that the CEA itself includes additional sub-definitions of agricultural, exempt,[13] and excluded commodities, as well as several other sections in which gold and precious metals are specifically referenced (*e.g.*, § 19 of the CEA).[14] Third, the CFTC lists numerous cases which held that currencies, interest rates or indices, events and occurrences, digital assets / cryptocurrencies, and precious metals are all recognized as commodities.[15] Fourth, the CFTC notes that the carve-out of onions and movie box office receivables proves that the scope of the "commodity" definition in § 1a(9) is much broader than merely agricultural commodities.[16]

In fact, even though not mentioned in the August 28 CFTC's Brief, on July 18, 2025, the President signed into law the GENIUS Act, which amended the CEA and added to the list of carved out "commodities" payment stablecoins issued under the GENIUS Act.[17] Logically, if something was not already a "commodity," there would be no reason to carve that good or article from the definition of a "commodity," indicating that stablecoins were previously commodities.

Finally, the CFTC states that "[m]oreover, precious metals are 'goods' or 'articles' 'in which contracts for future delivery are presently . . . dealt in,' as numerous precious metals futures contracts are traded on CFTC-regulated exchanges, such as those operated by ICE Futures US and the Chicago Mercantile Exchange."

Additionally, to follow the judge's logic in the July 21 Opinion and Order, the definition of "security" under the Securities Act of 1933 and the Securities and Exchange Act of 1934[18] would only include a very narrow list of "securities," per 15 U.S.C. § 77b(1), and clearly would not include investment contracts on orange grove properties in Florida, as is now well-established under the Howey Test.[19] And ignoring the holdings of numerous cases addressing the scope of § 1a(9) of the CEA is "absolutely weird," to quote U.S. Supreme Court Justice Antonin Scalia (in reference to another unrelated case).

The defendants' argument that the gold and silver bullion had significant numismatic value is inapposite because there were millions of these coins issued,[20] they are contemporary, and the secondary market trading in these coins is at, or substantially at, the spot price of gold and silver, proving that the coins and the bullion are the same as precious metals themselves, which are "commodities."[21]

- **Discussion of § 2(C)(2)(D) and § 19 of the CEA**.

The judge addressed § 2(C)(2)(D) of the CEA, discussing the "actual delivery" exemption. This provision had nothing to do with the case at hand, because the contracts in question were not leveraged retail commodity contracts and therefore not derivatives, meaning that the fact that these coins and bullion were "actually delivered" has no bearing on this case.

Likewise, these contracts were not § 19 leveraged contracts, which is not alleged in this case. However, the CFTC did note that reference to § 19 is helpful since it specifically refers to precious metals, bullion, and coins, confirming that gold and silver are "commodities" under the CEA.

- **Implications on other markets**.

If the Texas judge's conclusion in the July 21 Opinion and Order that gold and silver are not "commodities" were to stand, significant implications would follow: first, there would be confusion in the commodities industry, which relies on existing case law and the CFTC's interpretation of what is a "commodity"; second, there would be significant uncertainty over the CFTC's anti-fraud and anti-manipulation jurisdictional reach under § 6(c)(1) of the CEA and § 180.1 of the CFTC regulations; and third, participants in novel commodities markets, *e.g.*, markets in digital commodities and digital assets, would be reluctant to develop new products given the uncertainty over the CFTC's jurisdictional reach, especially at a time when the CFTC is likely to be granted additional exclusive jurisdiction over spot and forward (*i.e.*, non-derivative) markets in digital commodities (*e.g.*, under the Clarity Act enacted in the U.S. House on July 17, 2025, or similar legislation).[22]

In sum, the Texas judge's July 21 opinion either completely missed or significantly and materially misinterpreted the CEA and over 100 years worth of legal precedent.

[1] Mem. Op. & Order Den. Mots. for Summ. J., CFTC et al., v. TMTE, Inc. a/k/a/ METALS.COM et al., No. 3:20-cv-02910-X (N.D. Tex. July 21, 2025) (No. 911) (the "***July 21 Opinion and Order***").

[2] 7 U.S.C. § 1a *et seq*.

[3] July 21 Opinion and Order at 9.

[4] Pl. CFTC's Resp. in Opp'n to Defs. Mot. to Recons. Summ. J. Order & Cross-Mot. for Recons., CFTC et al. v. TMTE, Inc. a/k/a METALS.COM et al., No. 3:20-cv-02910-X (N.D. Tex. Aug. 28, 2025) (No. 934) (the "***August 28 CFTC's Brief***").

[5] *See* **https://www.cftc.gov/PressRoom/PressReleases/8254-20** (the "***Sept. 2020 CFTC Complaint***").

[6] The assets in question were Silver Royal Canadian Mint Polar Bear Bullion, Gold Royal Canadian Mint Polar Bear Bullion and Gold British Standard Bullion (collectively, the "***gold and silver bullion***"). These are very actively traded coins and bullion and there are many millions of them in circulation, meaning that these are not unique numismatic assets.

[7] 7 C.F.R. § 1 *et seq.*

[8] Derivatives include swaps, options, futures, and certain retail leveraged products. *See* 7 U.S.C. § 1a(10)(A) (defining "commodity interests" to include futures, swaps, options, and certain leveraged transactions).

[9] § 2(a)(1)(A) of the CEA gives the CFTC exclusive jurisdiction over "transactions involving swaps or contracts of sale of a commodity for future delivery."

[10] § 6(c)(1) of the CEA and 17 C.F.R. § 180.1 of CFTC regulations which prohibit fraud "in connection with … a contract of sale of commodity in interstate commerce."

[11] August 28 CFTC's Brief at 15.

[12] *Id.* at 6–8.

[13] The August 28 CFTC's Brief states that: "[p]hysical commodities such as gold, silver, platinum, palladium, oil, and gas are all examples of "exempt" commodities that are not agricultural but are nonetheless "commodities" under the CEA."

[14] August 28 CFTC's Brief at 8–11, 18–22.

[15] *Id.* at 12–14.

[16] *Id.* at 6.

[17] Guiding and Establishing National Innovation for U.S. Stablecoins (GENIUS) Act, Pub. L. No. 119-27, 139 Stat. 419, at § 17(f) (amending § 1a(9) of the CEA).

[18] 15 U.S.C. § 77a *et seq.*; 15 U.S.C. § 78a *et seq.* The definition of "security" may be found at 15 U.S.C. § 77b(a)(1).

[19] *See* *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

[20] The Sept. 2020 CFTC's Complaint states at 80: "Contrary to Metals' false claims, Polar Bear Bullion have no numismatic or seminumismatic value. Polar Bear Bullion are readily available to the public and are not rare. In fact, there are over 6 million units of Polar Bear Bullion in circulation."

[21] For example, an ancient Byzantine gold coin (solidus) typically included 4.5 grams of gold, which as of the date of this article, is approximately $491 without taking into account its numismatic value; however, a Constantine the Great gold solidus coin minted between 307 and 337 may trade between $5,000 and $13,000 and one is currently listed on eBay for $128,000. This example illustrates that a highly rare gold coin of a numismatic value will be worth far more than the value of the precious metal itself and would certainly not itself be a "commodity."

[22] *See* House Comm. on Fin. Servs. & House Comm. on Agric., Section-by-Section: Digital Asset Market Clarity (CLARITY) Act of 2025 (Jul. 10, 2025), https://financialservices.house.gov/uploadedfiles/2025-07-10_-_sbs_-_clarity_act_of_2025_final.pdf.

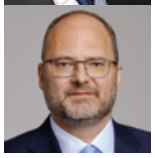
Cadwalader Capital Corner

September 4, 2025

Check out this week's Capital Corner:

Federal Reserve Announces Individual Capital Requirements for Large Banks

Daniel Meade, Partner | Financial Regulation



Chris Horn, Partner | Financial Services

On August 29, the Federal Reserve Board ("FRB") **announced** the individual capital requirements for all large banks, effective on October 1. This announcement follows the **June announcement** on the results of the supervisory stress test (also known as the Dodd-Frank Act Stress Test or DFAST, as these tests are required by **Section 165** of the Dodd-Frank Act), which assesses whether banks are sufficiently capitalized to absorb losses during a severe recession.

Under the current capital rules, the total common equity tier 1 ("CET1") requirements for covered bank holding companies, savings and loan holding companies, and U.S. intermediate holding companies with $100 billion or more in total consolidated assets are, in part, determined by the supervisory stress test results." The FRB's announcement includes a table showing the total CET1 capital ratio requirement for each of the 34 large banks, including that ratio's three components: (1) the minimum CET1 capital ratio requirement of 4.5% for all the 31 banks; (2) the stress capital buffer ("SCB") requirement for 30 of the 31 covered banks, which is determined from the supervisory stress test results and is at least 2.5%; and (3) the global systemically important bank ("G-SIB") surcharge for the eight U.S. G-SIBs.

As we noted in **July**, many banks saw their SCBs reduced this year compared to 2024 results, some saw no change (generally those already at the 2.5% minimum), and one bank saw an increase. The minimum CET1 capital requirements for the 31 large banking organizations range from 7.0%-16.0%.

The FRB did note that one bank is requesting reconsideration of its SCB, and that review of the request remains pending and should be completed by the end of September.

The FRB also noted that in **April**, it proposed a rule to average stress test results over two consecutive years to reduce volatility. If the FRB finalizes the rule as proposed, this year's stress test results will be averaged with those from 2024, and the FRB would update the resulting capital requirements. As part of the FRB press release, Vice Chair for Supervision Michelle Bowman stated "[f]inalizing the rule proposed in April would be an important next step to reducing year-over-year volatility in bank capital requirements. This would allow the Board to publish revised stress capital buffer requirements once the rule is finalized, based on averaged stress test results."

CFTC Operational Resilience Rules Have ‘No Chance’ of Revival

September 4, 2025

Cadwalader partner **Peter Malyshev** was mentioned in a recent *Risk.net* article on the Commodity Futures Trading Commission’s proposed operational resilience framework.

While supportive of the proposal’s objectives, Peter noted it is a low priority for the CFTC under the current administration. He emphasized that operational resilience goes beyond cybersecurity, encompassing issues such as those raised by the COVID-19 pandemic. He also observed that even without direct regulation of third-party vendors, the CFTC can still place pressure on regulated entities to ensure their vendors meet appropriate standards.

Peter added that any final framework would likely need to be updated to reflect recent developments, particularly the rapid expansion of cryptocurrency trading and technology. Unlike banks in conventional derivatives markets, many crypto firms are non-banks for which the CFTC is the sole regulator.

Read more **here** (subscription required).

Crypto Summer: How the GENIUS Act and CLARITY Act Will Change Everything

September 4, 2025

Cadwalader is thrilled to host a seminar on September 17 in our New York office: the Impact of Crypto Summer on Financial Institutions.

This event will bring together industry leaders and experts for an afternoon of insightful discussions on the GENIUS Act and the use of payment stablecoins as collateral, and on the CLARITY Bill covering both market infrastructure and the future of traditional finance. We will conclude this event with a networking reception for attendees and speakers.

- 3:00 PM – Registration
- 3:30 PM – Seminar
- 5:30 PM – Cocktail Reception

Speakers include Peter Malyshev, Lary Stromfeld, Mercedes Kelley Tunstall, Christopher McDermott, Douglas Mintz, Daniel Meade, Kathryn Borgeson and Sophie Cuthbertson.

Stay tuned for a detailed schedule and more about our substantive panels. Register **here**.